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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/975,471	10/11/2001	James D. Ralph	F-209	9649

7590 12/18/2003

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EXAMINER

PELLEGRINO, BRIAN E

ART UNIT	PAPER NUMBER
3738	

DATE MAILED: 12/18/2003

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Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No. 09/975,471	Applicant(s) RALPH ET AL.
	Examiner Brian E Pellegrino	Art Unit 3738

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1) Responsive to communication(s) filed on 08 September 2003.

2a) This action is FINAL.      2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4) Claim(s) 1-20 is/are pending in the application.

4a) Of the above claim(s) 6,8 and 10 is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 1-5,7,9 and 11-20 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on 11 October 2001 is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11) The proposed drawing correction filed on \_\_\_\_\_ is: a) approved b) disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.

12) The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) All b) Some \* c) None of:  
1. Certified copies of the priority documents have been received.  
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.

14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) The translation of the foreign language provisional application has been received.

15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) 3.	4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____. 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) 6) <input type="checkbox"/> Other: _____
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## DETAILED ACTION

### ***Election/Restrictions***

Claims 6,8,10 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected species, there being no allowable generic or linking claim. Election was made **without** traverse in Paper No. 5.

### ***Drawings***

Figures 1 and 2 should be designated by a legend such as --Prior Art-- because only that which is old is illustrated. See MPEP § 608.02(g).

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-5,9,13-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ralph et al. (5989291) in view of Crabbs (2193122) and Cologna et al. (5034254). Ralph et al. disclose (Fig. 9) an intervertebral spacer having first **100a** and second **200** plates in a spaced apart relationship that oppose one another. It can also be seen (Fig. 5) that a Belleville washer **130** with a central opening **132** is used in the device as a restoring force element. With respect to the limitation of a retaining wall on the first plate

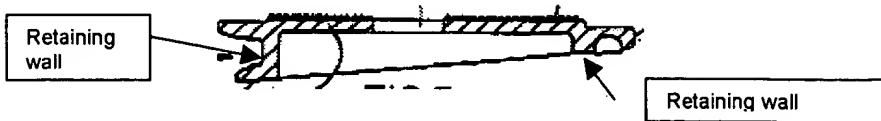


Fig. 7 shows a post structure 204 with a ball-shaped head on the second plate. It can also be seen there is a threaded bore 209 in the post for a setscrew 205. Fig. 8 shows the washer having a curvate volume 233 for the ball-shaped head. However, Ralph et al. do not disclose the Belleville washer has at least one radially spaced concentric groove or spiral slots. Crabbs shows (Fig. 3) a washer 39 with a plurality of radially spaced concentric grooves 43. Crabbs also teaches the grooves provide the ability of the washer to be more compressively resilient, col. 3, lines 44-47. Cologna et al. show (Fig. 5) a washer 28 with a plurality of spiral slots extending from a locus on the peripheral edge to a locus, which is radially in from the edge. Cologna et al. teach that providing a washer with spiral slots reduces the resistance the washer has exerted on it by the forces acting on it, col. 7, lines 23-28. It would have been obvious to one of ordinary skill in the art at the time of the invention to use a plurality of radially concentric grooves in the washer as taught by Crabbs and spiral slots as taught by Cologna et al. in the intervertebral spacer of Ralph et al. in order to enable the vertebral device to provide more resiliency since the washer is more expandable and flexible resulting from the incorporation of slots and grooves.

***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-5,7,9,11-20 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-7, 9,11-18,20 of copending Application No. 09/974154 in view of Cologna et al. (5034254). US application 09/974154 discloses the invention as claim except for the spiral slots. Cologna et al. teach that providing a washer with spiral slots reduces the resistance the washer has exerted on it by the forces acting on it, col. 7, lines 23-28. It would have been obvious to one of ordinary skill in the art to use spiral slots in the washer of copending application 09/974154 to impart more flexibility in the device.

This is a provisional obviousness-type double patenting rejection.

***Allowable Subject Matter***

Claims 7,11,12 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brian E Pellegrino whose telephone number is 703-306-5899. The examiner can normally be reached on M-Th (8:30am-6pm) 2nd F (8:30-5pm).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Corrine McDermott can be reached on 703-308-2111. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9306 for regular communications and 703-872-9306 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0858.

Brian E. Pellegrino

TC 3700, AU 3738

*Brian E. Pellegrino*